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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
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8

9 Shawn Lee Thompson,

No. CV-23-08577-PCT-SRB (ASB)

10 Petitioner,

REPORT AND RECOMMENDATION

11 v.

12 Ryan Thornell, et al.,

13 Respondents.

14
15 TO THE HONORABLE SUSAN R. BOLTON, SENIOR UNITED STATES
16 DISTRICT JUDGE:

17 Petitioner Shawn Lee Thompson (“Petitioner”), who is not in confinement, has
18 filed an Amended Petition for Writ of Habeas Corpus (“Amended Petition”) pursuant to
19 28 U.S.C. § 2254. (Doc. 4).¹ Petitioner is represented by counsel in the instant habeas
20 proceedings. For the reasons that follow, the Court recommends that the Amended
21 Petition be denied and dismissed.

22 **PROCEDURAL HISTORY**

23 **I. State Proceedings**

24 **A. Facts**

25 The Arizona Superior Court found the following facts and procedural history as
26 true:²

27 ¹ Citation to the record indicates documents as they are displayed in the District of
28 Arizona’s official Court electronic document filing system under Case No. CV-23-
08577-PCT-SRB (ASB).

² The superior court’s recitation of the facts is presumed correct. See 28 U.S.C. §

1 On July 5, 2011, Defendant plead[ed] guilty to one count of
2 Luring a Minor for Sexual Exploitation and two counts of
3 Aggravated Luring a Minor for Sexual Exploitation. The
4 Court sentenced him to a 3.5-year prison term on the Luring a
5 Minor for Sexual Exploitation charge followed by lifetime
6 probation on the other two counts. Defendant was allowed to
7 transfer his probation supervision from Yavapai to Mohave
8 County upon his release from prison.

9
10 In October 2017, the Mohave County Adult Probation
11 Department conducted a probation search of his residence and
12 discovered what was believed to be contraband on his
13 computer. The Probation Department filed a Petition to
14 Revoke Probation on November 16, 2017 alleging multiple
15 violations of Special Sex Offender conditions, including Sex
Offender Condition #10. Specifically, the Petition alleged he
was using his computer and other internet capable devices to
1) chat and send photos over the internet to an unidentified
female, 2) view pornography, 3) solicit sexually illicit images,
and 4) possess sexually illicit materials. The Public
Defender's Office appointed Ms. Michelle DeWaelshe to
represent Defendant.

16
17 At an admission proceeding on January 2, 2018, Defendant
18 admitted to violating Sex Offender Condition #10 by
19 “*viewing pornographic materials over the browser on the*
[PlayStation 4].” Admission Transcript pg. 8, line 20-23,
20 01/02/18. However, he denied the other allegations relating to
21 Condition #10. The Court found Defendant’s admission to
viewing pornography using his computer constituted a
22 violation of Sex Offender Condition #10.

23
24 In Defendant’s written statement included as part of his Pre-
25 Sentence Information, he again acknowledged he was
26 “*viewing porn and flirting with females on the PlayStation*
Network ...”. In his written statement included as part of the
27 Dispositional Report, Defendant further admitted that “*on or*
between July and October 2017, [he] accessed the PS4 web
browser and watched pornographic materials of teen adult
and animated females.”

28 2254(d)(2), (e)(1).

1 The Court revoked Defendant's probation on January 22,
2 2018 and sentenced him to a five (5) year prison sentence on
3 one count of Aggravated Luring a Minor for Sexual
4 Exploitation followed by an additional term of lifetime
 probation on the remaining count.

5 (Doc. 10-2, Exh. S at 98-99) (italics and brackets in original.)

6 **B. Post-Conviction Relief Proceedings**

7 Petitioner first filed a notice of post-conviction relief ("PCR") in 2012, after he
8 was convicted of the underlying charges in this case. (Doc. 10-1, Exh. E.) That notice
9 was voluntarily dismissed. (Doc. 10-1, Exhs. G, H.) The relevant PCR proceedings began
10 after Petitioner's probation violation disposition hearing on January 22, 2018. (Doc. 10-1,
11 Exh. I.)

12 After he was sentenced on the probation violation, Petitioner filed his second PCR
13 notice on April 17, 2018, raising a claim of ineffective assistance of counsel. (Doc. 10-1,
14 Exh. J.) The notice was originally dismissed on December 12, 2018, but on January 16,
15 2019, the superior court reinstated Defendant's right to seek post-conviction relief due to
16 an issue with PCR counsel. (Doc. 10-1, Exh. L.) On September 11, 2019, the superior
17 court dismissed the PCR proceedings after finding that Petitioner failed to file a PCR
18 petition before the court's deadline. (Doc. 10-1, Exh. O.) Petitioner did not appeal the
19 dismissal.

20 On April 1, 2021, Petitioner filed a third PCR notice (Doc. 10-1, Exh. P) along
21 with a PCR petition and "Opening Brief." (Doc. 10-1, Exh. Q; Doc. 10-2, Exh. R.)
22 Petitioner presented six issues in the Opening Brief, citing Fourth Amendment violations
23 related to the probation search, several instances of ineffective assistance of counsel, and
24 a lack of evidence supporting the probation revocation. (*See* Doc. 10-2, Exh. R.) The
25 superior court reviewed Petitioner's notice and extended explanation form to decide
26 whether the notice was proper. (Doc. 10-2, Exh. S.) Petitioner stated that his notice was
27 untimely because of changes to Arizona Rule of Criminal Procedure 33 in 2020. (Doc.
28 10-2, Exh. R.) He also stated that, in 2020-2021, electronic devices seized during the
 probation search were returned to him, and they contained evidence showing that he did

1 not violate the conditions of his probation.³ (*Id.*) The court found that neither of these
 2 events adequately explained why the claims were not raised previously or in a timely
 3 manner. (Doc. 10-2, Exh. S.) Accordingly, in an order dated May 12, 2021, the superior
 4 court dismissed the notice without addressing the merits of the PCR petition. (*Id.*)

5 On June 7, 2021, Petitioner filed a document titled “Defendant’s Response to
 6 Court’s Considering Whether Notice is Proper,” which the superior court treated as a
 7 Motion for Reconsideration. (Doc. 10-2, Exhs. T, U.) That court denied the motion on
 8 June 17, 2021, finding no basis for reconsideration. (Doc. 10-2, Exh. U.) On July 14,
 9 2021, Petitioner filed a Motion for Correction of Sentence, which the court also treated as
 10 a fourth PCR petition. (Doc. 10-2, Exhs. V, W.) On July 27, 2021, the superior court
 11 denied the Motion for Correction of Sentence as untimely and dismissed the PCR petition
 12 because Petitioner did not explain why the claims were not raised previously or in a
 13 timely manner. (Doc. 10-2, Exh. W.)

14 On August 16, 2021, Petitioner filed a Petition for Review with the Arizona Court
 15 of Appeals. (Docs. 10-3, 10-4, 10-5, Exh. X.) On December 23, 2021, the Court of
 16 Appeals denied the petition for review, finding no abuse of discretion. (Doc. 10-6, Exh.
 17 AA.) Following the denial, Petitioner, through counsel, filed a Petition for Review with
 18 the Arizona Supreme Court on January 27, 2022. (Doc. 10-6, Exh. BB.) On review,
 19 Petitioner presented four issues:

- 20 I. [Did] [t]he Superior Court err in finding Mr. Thompson’s Rule 33.1
 Petition untimely?
- 21 II. Was Mr. Thompson prejudiced by an illegal sentence as it stemmed from
 an erroneous probation violation?
- 22 III. [Were] Mr. Thompson’s rights violated when he was arrested for a
 probation violation without proper notice?
- 23 IV. Did Mr. Thompson suffer ineffective assistance of counsel for counsel’s
 failure to address Mr. Thompson’s hospitalization at his revocation
 hearing?

27 ³ Petitioner initiated proceedings to facilitate the return of the seized property. This
 28 Court will not address the procedural history of those proceedings because they do not
 impact the analysis of Petitioner’s claims.

1 (Doc. 10-6, Exh. BB.) On October 7, 2022, the Supreme Court denied the petition for
 2 review. (Doc. 10-6, Exh. CC.)

3 **II. Federal Proceedings**

4 On October 11, 2023, Petitioner, through counsel, filed a Petition for Writ of
 5 Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1.) On February 15, 2024, Petitioner
 6 filed the instant Amended Petition. (Doc. 4.) In his Amended Petition, Petitioner asserts
 7 two grounds for relief, both centered on the probation violation proceedings:

8 GROUND ONE: Petitioner’s conviction violates his federal
 9 constitutional right to due process where he has been subject
 to an unreasonable search and seizure. U.S. Const. amend. IV.

10 GROUND TWO: Petitioner’s conviction violates his federal
 11 constitutional right to due process where he has been subject
 to ineffective assistance of counsel. U.S. Const. amend. XI.

12 (Doc. 4 at 6, 10.)

13 Respondents argue that Petitioner does not meet the “in custody” requirement of
 14 28 U.S.C. § 2254 because his challenges are based on the probation violation proceedings,
 15 rather than the underlying conviction for which his lifetime probation was originally
 16 imposed. (Doc. 10 at 4-5.) Respondents also assert that the Amended Petition is untimely
 17 and that both claims are procedurally defaulted. (*Id.* at 5-15.) Petitioner filed a Reply
 18 arguing that he is in custody within the meaning of the statute, his Amended Petition is
 19 subject to equitable tolling, and his claims are not procedurally defaulted. (Doc. 11.)

20 **ANALYSIS**

21 **I. Jurisdiction**

22 The writ of habeas corpus affords relief to persons in custody pursuant to the
 23 judgment of a state court in violation of the Constitution, laws, or treaties of the United
 24 States. 28 U.S.C. §§ 2241(c)(3), 2254(a). The law requires “that the habeas petitioner be
 25 ‘in custody’ under the conviction or sentence under attack at the time his petition is
 26 filed,” even if the petitioner is not physically confined. *Maleng v. Cook*, 490 U.S. 488,
 27 490-91 (1989) (citations omitted). Additionally, “a person is in custody pursuant to a
 28 judgment of a State court . . . when the prisoner’s custody is attributable, at least in part,

1 to such a judgment.” *Dominguez v. Kernan*, 906 F.3d 1127, 1136 (9th Cir. 2018) (quoting
 2 *White v. Lambert*, 370 F.3d 1002, 1007-08 (9th Cir. 2004)) (internal quotations omitted).
 3 Petitioner is on probation, which generally satisfies the “in custody” requirement. *Chaker*
 4 *v. Crogan*, 428 F.3d 1215, 1219 (9th Cir. 2005) (citations omitted). Because Petitioner’s
 5 lifetime probation was reinstated at the time of his probation violation, and Respondents
 6 did not cite authority to the contrary, the Court will assume the “in custody” requirement
 7 is met.

8 **II. Timeliness**

9 Petitions for Habeas Corpus are governed by the Antiterrorism and Effective
 10 Death Penalty Act of 1996 (“AEDPA”). 28 U.S.C. § 2244. The AEDPA imposes a one-
 11 year limitation period on state prisoners filing habeas corpus petitions in federal court. 28
 12 U.S.C. § 2244(d)(1). The limitation period generally runs from the latest of the following:

- 13 (A) the date on which the judgment became final by the
 conclusion of direct review or the expiration of the time for
 seeking such review;
- 14 (B) the date on which the impediment to filing an application
 created by State action in violation of the Constitution or laws
 of the United States is removed, if the applicant was
 prevented from filing by such State action;
- 15 (C) the date on which the constitutional right asserted was
 initially recognized by the Supreme Court, if the right has
 been newly recognized by the Supreme Court and made
 retroactively applicable to cases on collateral review; or
- 16 (D) the date on which the factual predicate of the claim or
 claims presented could have been discovered through the
 exercise of due diligence.

17 28 U.S.C. § 2244(d)(1).

18 On January 22, 2018, the trial court sentenced Petitioner on the probation
 19 violation. Petitioner then initiated his of-right review on April 17, 2018, when he filed a
 20 PCR notice. The review concluded on September 11, 2019 when the superior court
 21 dismissed the notice. Thus, Petitioner’s convictions became final for the purposes of

1 AEDPA on October 11, 2019, upon the expiration of his time for seeking review. *See*
 2 Ariz. R. Crim. P. 32.9(c) (abrogated 2020) (“No later than 30 days after the entry of the
 3 trial court’s final decision on a petition or a motion for rehearing, an aggrieved party may
 4 petition the appropriate appellate court for review of the decision.”). The AEDPA’s
 5 statute of limitations therefore began running on October 12, 2019,⁴ and expired one year
 6 later, on October 12, 2020. Petitioner filed his original habeas petition on October 11,
 7 2023, nearly three years after the one-year limitation period had expired. (*See* Doc. 1.)

8 Regarding the timeliness of the Petition, Petitioner argues that the statute of
 9 limitations only began on October 7, 2022 when the Arizona Supreme Court denied
 10 review. (Doc. 4 at 15.) However, the AEDPA’s one-year limitation period is tolled only
 11 for the time “during which a properly filed application for State post-conviction or other
 12 collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. §
 13 2244(d)(2). Moreover, “filing a new petition for post-conviction relief does not hit a reset
 14 button on a statute of limitations that has already run before the new petition was filed.”
 15 *Blackwater v. Ryan*, No. CV-14-01533-PHX-JAT, 2015 WL 4464566, at *2 (D. Ariz.
 16 July 21, 2015) (citing *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003)).
 17 Petitioner does not explain why the one-year period did not begin after the dismissal of
 18 the second PCR proceeding in 2019, as outlined above.

19 Instead, Petitioner argues that “it was not until property was released to him in
 20 June of 2022⁵ [that] he discover[ed] the basis for his claims presented in this matter.”
 21 (Doc. 11 at 2.) There are several dates in the record referring to the return of Petitioner’s
 22 property from the probation department. The superior court wrote in its order dismissing
 23 the third PCR petition that Petitioner received the seized property in June 2020. (Doc 10-
 24 2, Exh S at 100.) In the extended information form accompanying his April 1, 2021 PCR

25
 26 ⁴ For purposes of counting time for a federal statute of limitations, the standards in
 27 Federal Rule of Civil Procedure 6(a) apply. *Patterson v. Stewart*, 251 F.3d 1243, 1246
 28 (9th Cir. 2001). Thus, the one-year statute of limitations began running the day after
 Petitioner’s convictions became final for purposes of the AEDPA. *See* Fed. R. Civ. P.
 6(a)(1)(A) (“[E]xclude the day of the event that triggers the period”).

5 There is nothing in the record indicating that Petitioner received property in 2022,
 so the Court believes this date to be a typographical error.

1 petition, Petitioner wrote that the seized property “beg[a]n to become access[i]ble”
 2 through conversations in June 2020. (Doc. 10-2, Exh. R at 4.) But Petitioner also wrote
 3 that he received property on September 10, 2020 and received a flash drive on February
 4 3, 2021. (*Id.*) In the third PCR petition, Petitioner attached court orders indicating the
 5 property-related proceedings were ongoing through at least October 21, 2020. (*Id.* at 37.)
 6 However, Petitioner does not specify which of these dates are relevant to his claims. (See
 7 Docs. 4, 11.)

8 To the extent that Petitioner is arguing his Petition is not barred under 28 U.S.C. §
 9 2244(d)(1)(D) because he only obtained the seized property in 2020-2021, the argument
 10 is unavailing. Subsection D provides that the one-year statute of limitations begins to run
 11 when the “factual predicate” of the habeas claims could have been discovered with due
 12 diligence. 28 U.S.C. § 2244(d)(1)(D). However, Petitioner’s claims of unreasonable
 13 search and seizure and ineffective assistance of counsel are not predicated on facts related
 14 to the returned property. The only time Petitioner references the returned property in his
 15 Amended Petition is when he states that the lack of evidence found on his computer after
 16 its return from the probation department proves the search was unreasonable.⁶ (See Doc.
 17 4 at 6-13.) Moreover, Petitioner does not explain why he could not have discovered these
 18 facts earlier, given that he had knowledge of his own use of his property. *See id.*; *see also*
 19 *United States v. Harrington*, 410 F.3d 598, 600-01 (9th Cir. 2005) (holding that
 20 photographs of the crime scene, a street map, and transcripts of prior proceedings could
 21 have been identified with due diligence and were not newly discovered).

22 Assuming for the sake of argument Petitioner could have only discovered his
 23 claims on the date the seized property was returned, his Petition is still untimely.⁷
 24 Petitioner does not provide the exact date that he received his property. But even if the

25 ⁶ The Amended Petition states, “[l]ike the defendant in *Lara* . . . Mr. Thompson
 26 merely missing a meeting is not enough to justify a warrantless search of his
 27 technological devices, especially when the State itself returned the devices to Mr.
 28 Thompson, indicating that no criminal activity had actually been discovered on the
 device.” (Doc. 4 at 9) (citing *United States v. Lara*, 815 F.3d 605 (2016)).

7 Whether the Amended Petition is timely relative to when Petitioner’s property was
 returned is inconsequential because, as discussed *infra* Section V, the evidence found is
 not relevant to Petitioner’s probation violation proceedings or the instant claims.

1 statute of limitations only began on February 3, 2021, the latest date appearing in the
 2 record that any property may have been returned, Petitioner still did not file his habeas
 3 petition until October 11, 2023. After February 3, 2021, the one-year limitations period
 4 only would have tolled while Petitioner's second PCR notice was pending, from April 1,
 5 2021 until May 13, 2021. Petitioner's subsequent filings were not considered to be
 6 properly filed, as they were deemed untimely. Therefore, Petitioner would not have been
 7 entitled to more statutory tolling. *See 28 U.S.C. § 2244(d)(2)* ("The time during which a
 8 properly filed application for State post-conviction or other collateral review with respect
 9 to the pertinent judgment or claim is pending shall not be counted toward any period of
 10 limitation under this subsection."). The Petition is untimely unless equitable or statutory
 11 tolling applies.

12 **III. Equitable Tolling**

13 The one-year limitation period may be subject to equitable tolling in "appropriate
 14 cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010); *see Miranda v. Castro*, 292 F.3d
 15 1063, 1066 (9th Cir. 2002) (stating "the threshold necessary to trigger equitable tolling
 16 [under AEDPA] is very high"). A petitioner is entitled to equitable tolling only if he
 17 shows: "(1) that he has been pursuing his rights diligently, and (2) that some
 18 extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 560
 19 U.S. at 649 (internal quotations and citations omitted). Petitioner bears the burden of
 20 establishing that equitable tolling is warranted. *Rasberry v. Garcia*, 448 F.3d 1150, 1153
 21 (9th Cir. 2006) ("Our precedent permits equitable tolling of the one-year statute of
 22 limitations on habeas petitions, but the petitioner bears the burden of showing that
 23 equitable tolling is appropriate.").

24 Regarding the first prong, a petitioner must demonstrate that "he has been
 25 reasonably diligent in pursuing his rights not only while an impediment to filing caused
 26 by an extraordinary circumstance existed, but before and after as well, up to the time of
 27 filing his claim in federal court." *Smith v. Davis*, 953 F.3d 582, 598-99 (9th Cir. 2020).
 28 The second prong is met "only when an extraordinary circumstance prevented a

1 petitioner acting with reasonable diligence from making a timely filing[.]” *Id.* at 600. In
2 evaluating whether an “extraordinary circumstance” exists, the Court “must decide the
3 issue based on all the circumstances of the case before it.” *Smith*, 953 F.3d at 600
4 (internal quotations and citations omitted). “The grounds for equitable tolling are highly
5 fact-dependent.” *Grant v. Swarthout*, 862 F.3d 914, 918 (9th Cir. 2017) (quoting *Sossa v.*
6 *Diaz*, 729 F.3d 1225, 1237 (9th Cir. 2013)).

7 Here, equitable tolling is not appropriate. Petitioner argues that he was prevented
8 from filing a timely PCR petition because the property seized during the probation search
9 was not returned to him. (Doc. 11 at 4-5.) However, Petitioner has not shown how the
10 fact that he could not inspect the seized property until it was released caused the
11 untimeliness of his habeas filing. See *Stillman v. LaMarque*, 319 F.3d 1199, 1203 (9th
12 Cir. 2003) (holding a prisoner must show that the “extraordinary circumstances” were the
13 cause of his untimeliness).

14 The record also shows that Petitioner was not diligent in pursuing his claims
15 before, during, and after any extraordinary circumstance existed. Petitioner originally
16 filed a timely PCR notice on April 17, 2018, but the notice was eventually dismissed
17 because Petitioner failed to file a PCR petition before the deadline. (Doc. 10-1, Exh. O.)
18 Further, Petitioner does not explain when he received the property that, according to him,
19 contained evidence relating to his claims. After the superior court denied the third PCR
20 notice, Petitioner filed two more motions with the superior court. (Doc. 10-2, Exhs. T,
21 V.) But Petitioner did not appeal to the Arizona Court of Appeals until after his fourth
22 PCR notice was denied. (Docs. 10-3, 10-4, 10-5, Exh. X.) Although Petitioner made
23 various efforts to pursue claims in the state courts between April 2021 and January 2022,
24 he does not adequately explain the original delay or why his filing was untimely even
25 after the probation department returned his property. Because Petitioner has not shown
26 that he has been pursuing his rights diligently or that an extraordinary circumstance
27 caused the untimeliness, the one-year AEDPA limitation period is not subject to equitable
28 tolling.

1 **IV. Statutory Tolling**

2 The AEDPA also provides for statutory tolling during the time “a properly filed
 3 application for State post-conviction or other collateral review with respect to the
 4 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). As discussed, *supra*, on
 5 April 17, 2018, Petitioner filed a PCR notice, which tolled the statute of limitations until
 6 the superior court dismissed the notice and the period to seek review expired on October
 7 11, 2019. The statute of limitations then ran for one year until October 12, 2020. Because
 8 Petitioner’s subsequent PCR notices and other filings were deemed untimely by the
 9 superior court, statutory tolling does not apply. *See Pace v. DiGuglielmo*, 544 U.S. 408,
 10 417 (2005) (holding “[b]ecause the state court rejected petitioner’s [PCR] petition as
 11 untimely, it was not ‘properly filed,’ and he is not entitled to statutory tolling under §
 12 2244(d)(2).”). Petitioner did not file his original habeas petition until October 11, 2023.
 13 (*See Doc. 1.*) Therefore, Petitioner was more than one year late in filing his habeas
 14 petition, despite the statutory tolling.

15 **V. Actual Innocence**

16 A time-barred federal habeas petition may also be considered by this Court if a
 17 petitioner can make a showing of “actual innocence.” *See McQuiggin v. Perkins*, 569
 18 U.S. 383, 391-96 (2013) (holding that the “actual innocence gateway” extends to
 19 petitions that are time-barred under the AEDPA); *see also Schlup v. Delo*, 513 U.S. 298
 20 (1995) (applying an “actual innocence gateway” to federal habeas procedural bars); *Lee*
 21 *v. Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (“[A] claim of actual innocence constitutes
 22 an equitable exception to AEDPA’s limitations period, and a petitioner who makes such a
 23 showing may pass through the *Schlup* gateway and have his otherwise time-barred claims
 24 heard on the merits.”). Under *Schlup*, a petitioner seeking federal habeas review under the
 25 actual innocence gateway must establish his factual innocence and “not mere legal
 26 insufficiency.” *See Bousley v. United States*, 523 U.S. 614, 623 (1998). A petitioner
 27 “must show that it is more likely than not that no reasonable juror would have convicted
 28 him in the light of the new evidence.” *McQuiggin*, 569 U.S. at 399 (quoting *Schlup*, 513

1 U.S. at 327). “To be credible, such a claim requires petitioner to support his allegations of
 2 constitutional error with new reliable evidence—whether it be exculpatory scientific
 3 evidence, trustworthy eyewitness accounts, or critical physical evidence.” *Schlup*, 513
 4 U.S. at 324.

5 Petitioner claims that evidence found on the returned property shows that no
 6 reasonable juror would have convicted him of the probation violation. (Doc. 11 at 7.) The
 7 superior court addressed this argument when it dismissed Petitioner’s second PCR notice.
 8 (Doc. 10, Exh. S.) The petition to revoke Petitioner’s probation alleged that Petitioner
 9 used “his computer and other devices to 1) chat and send photos over the internet to an
 10 unidentified female, 2) view pornography, 3) solicit sexually illicit images, and 4)
 11 possess sexually illicit images.” (*Id.*) At an admission proceeding, Petitioner “admitted to
 12 violating Sex Offender Condition #10 by ‘*viewing pornographic materials over the*
 13 *browser on the [PlayStation4],*’” but he denied the other allegations relating to Condition
 14 10. (*Id.* (quoting Admission Transcript) (italics and brackets in original)) In a written
 15 statement included in the dispositional report, Petitioner admitted that he “*accessed the*
 16 *PS4 web browser and watched pornographic materials of teen adult and animated*
 17 *females.*” (*Id.* (italics and brackets in original)) Based on this admission, the court
 18 revoked Petitioner’s probation. (*Id.*)

19 In his Reply, Petitioner states that evidence found on the returned devices shows
 20 that he did not, in fact, violate the conditions of his probation:

21 [W]hen Mr. Thompson’s property (electronic devices) were
 22 released to him, he was able to view the alleged violations of
 23 his probation consisting of communications to a woman that
 24 ended up being an email to the wife of his business partner
 25 for business purposes. This communication did not violate his
 26 internet directive as alleged by APD, who made it appear as if
 27 Mr. Thompson was sending inappropriate messages and
 28 photographs to an ‘unidentified female.’ Looking at the
 messages themselves, no criminal activity or sexual activity
 occurred and was within the realm of APD’s internet
 allowances.

1 (Doc. 11 at 7.) As the superior court stated, the evidence described has no bearing on
 2 whether Petitioner is innocent of using the devices to view pornography, the admission
 3 which constituted the probation violation. (*See Doc. 10, Exh. S.* (“It was his viewing of
 4 pornography and his admission to that which formed the basis of the probation violation.
 5 Whether the computer equipment returned to him in 2020 contained any contraband is
 6 not relevant and does not justify the untimely filing of the Notice.”)) Petitioner has not
 7 provided the Court with new evidence that more likely than not would have prevented a
 8 jury from convicting him of the probation violation. Accordingly, Petitioner cannot pass
 9 through the actual innocence gateway to excuse the untimeliness of his habeas petition.

10 **CONCLUSION**

11 The Court concludes Petitioner’s habeas Petition was untimely filed, and neither
 12 equitable tolling, statutory tolling, nor the actual innocence gateway apply to render the
 13 filing of the Petition as timely. The record is sufficiently developed, and the Court does
 14 not find that an evidentiary hearing is necessary for resolution of this matter. *See Rhoades*
 15 *v. Henry*, 638 F.3d 1027, 1041 (9th Cir. 2011). Accordingly,

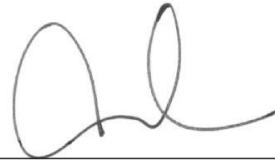
16 **IT IS THEREFORE RECOMMENDED** that Petitioner’s Amended Petition for
 17 Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 4) be **DENIED** and
 18 **DISMISSED WITH PREJUDICE**.

19 This Report and Recommendation is not an order that is immediately appealable to
 20 the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1),
 21 Federal Rules of Appellate Procedure, should not be filed until entry of the District
 22 Court’s judgment. The parties shall have fourteen days from the date of service of a copy
 23 of this Report and Recommendation within which to file specific written objections with
 24 the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(b) and 72. Thereafter, the
 25 parties have fourteen days within which to file a response to the objections.

26 Failure to timely file objections to the Magistrate Judge’s Report and
 27 Recommendation may result in the acceptance of the Report and Recommendation by the
 28 District Court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114,

1 1121 (9th Cir. 2003). Failure to timely file objections to any factual determinations of the
2 Magistrate Judge will be considered a waiver of a party's right to appellate review of the
3 findings of fact in an order of judgment entered pursuant to the Magistrate Judge's Report
4 and Recommendation. *See Fed. R. Civ. P. 72.*

5 Dated this 2nd day of October, 2024.



6
7 Honorable Alison S. Bachus
8 United States Magistrate Judge
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